TAN CHIN SWEE & ANOR

v.

SERI AMPANGAN REALTY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S4-24-1986-2003]
24 JANUARY 2005

CONTRACT: *Specific performance - Sale and purchase agreement - Consent of contracting parties not given freely for the same purpose - Plaintiffs agreed to purchase corner unit property while defendant intended to sell end lot unit - Mutual mistake - Whether agreement rendered void - Contracts Act 1950, ss. 10(1), 13, 14, 21 - Corner unit already sold to a bona fide third party purchaser - Whether plaintiffs entitled to specific performance*

CONTRACT: *Mistake - Mutual mistake - Sale and purchase agreement - Parties at cross purposes as to subject matter of contract - Plaintiffs agreed to purchase corner unit property while defendant intended to sell end lot unit - Whether agreement rendered void - Contracts Act 1950, ss. 10(1), 13, 14, 21 - Order of specific performance - Whether to be granted*

This suit arose from a purchase agreement signed between the plaintiffs and the defendant. The plaintiffs contended that it had purchased a parcel of property known as Parcel No: D2-8-3B for the purchase price of RM63,800 positioned as a corner unit as shown in the floor plan (exh. 'TCS1'). However, the defendant submitted that the unit of property transacted between the parties was Parcel No: D2-1-3B which was an end lot unit. This occurred as a result of a mistake which was not realised by either party to the sale and purchase agreement. Subsequently the plaintiffs sought for, *inter alia*, specific performance of the said agreement as framed in the originating summons in encl. 1. The defendant averred that the said Parcel No: D2-8-3B has been purchased and is owned by a third party with *bona fide* rights over the corner unit as it had paid the full consideration for the said property. Further, it was the defendant's stand that as a result of the mutual mistake, the sale and purchase agreement was therefore void.

Held (dismissing plaintiffs' originating summons):

[1] The parties, although intending to enter into a property transaction agreement, had made a mistake as to the unit number and its position. The plaintiffs had intended to purchase a corner unit while it was the defendant's intention to sell an end lot unit. It was a mutual mistake where the consent of the contracting parties was not given freely for the same purpose resulting in the agreement being void. (p 871 f-g)

[2] The granting of an order for specific performance is wholly within the purview of this court; however an order of the said remedy was not suitable in the circumstances. It was patently unfair to grant specific performance to the plaintiffs because the subject matter of the property, namely, the corner unit bearing Parcel No: D2-8-3B, was already sold to a *bona fide* third party purchaser for value. (pp 874 f & 876 a-b)

Case(s) referred to:

Denne v. Light [1857] 8 De GM & G 774 ***(refd)***
Kewangan Bersatu Bhd v. Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79 ***(refd)***
Lamare v. Dixon [1873] LR 6 HL 414 ***(refd)***
M Pakiam v. YP Devathanjam [1952] 18 MLJ 58 ***(refd)***
Ng Chun Lin & Anor v. Foo Lian Sin & Anor [2000] 6 CLJ 133 HC ***(refd)***
Norton v. Angus [1926] 38 CLR 523 ***(refd)***
Patel v. Ali [1984] 1 All ER 97 ***(refd)***
Raffles v. Wichelhaus [1864] 2 H & C 906 ***(refd)***
Scriven Bros v. Hindley & Co [1913] 3 KB 564 ***(refd)***
Sheikh Brothers Ltd v. Arnold Julius Ochsner & Anor [1957] AC 136 ***(refd)***
Stickney v. Keeble [1915] AC 386 ***(refd)***
Ted Bates (M) Sdn Bhd v. Balbir Singh Jholl [1979] 2 MLJ 257 ***(refd)***
Tham Kong v. Oh Hiam & Ors [1968] 1 MLJ 44 ***(refd)***
United Asian Bank Bhd v. Chun Chai Chai [1988] 2 CLJ 253; [1988] 2 CLJ (Rep) 502 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 10(1), 13, 14, 20, 21, 66
Rules of the High Court 1980, O. 2 r. 1, O. 28 r. 3(4)

Other source(s) referred to:

Dr Visu Sinnadurai, *Law of Contract*, pp 295, 303

For the plaintiffs - Balvinder Singh; M/s Shahrul Balvinder & Co
For the defendant - Bernard Chong; M/s LM Liew & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Facts Of The Case

The plaintiffs seek, *inter alia*, specific performance of a sale and purchase agreement signed between the plaintiffs and the defendant dated 21 December 1999 and such other orders as phrased and framed in paras. (a) to (g) of the originating summons in enclosure one (1) upon the premise that the plaintiffs had, apparently, purchased a parcel of property known as Parcel No: D2-8-3B measuring approximately 823 square feet for the purchase price of RM63,800 positioned as a corner unit as shown in the floor plan as reflected in exh. "TCS1" of the affidavit in encl. 2. In enclosure one (1), the plaintiffs sought for the following prayers:

a) satu deklarasi bahawa Plaintif-Plaintif diberikan satu Perintah Perlaksanaan Spesifik untuk menguatkuasakan Perjanjian tersebut;

b) satu deklarasi bahawa Defendan membayar Liquidated Ascertained Damages (LAD) bagi kelewatan milikan kosong pada kadar faedah 8% setahun ke atas harga belian premis tersebut yang dikira pada dasar harian kepada Plaintif-Plaintif mulai 12.01.2003 sehingga milikan kosong premis tersebut diberikan;

c) satu deklarasi bahawa Plaintif-Plaintif dibenarkan untuk set-off bagi membayar baki jumlah bagi perbezaan 'area-size' premis tersebut daripada jumlah LAD;

d) satu deklarasi bahawa Defendan diperintahkan untuk membayar gantirugi am kepada Plaintif-Plaintif dalam masa tujuh (7) hari dari tarikh perintah ini;

e) bahawa Defendan membayar faedah pada kadar 8% setahun mulai dari tarikh penghakiman sehingga penyelesaian sepenuhnya;

f) kos untuk ditaksirkan; dan

g) lain-lain relif dan/atau perintah yang mana Mahkamah yang mulia ini fikirkan adil, suai dan manfaat.

The defendant's case goes like this. That the unit of property transacted between the parties is known as Parcel No: D2-1-3B which is an end lot unit and not as claimed by the plaintiffs. However, the measurement and the purchase price are the same, namely, 823 square feet with a price tag of RM63,800. The difference is in regard to the unit number and its position and

this occurred as a result of a mistake which was not realised by either party to the sale and purchase agreement until approximately the month of January 2003.

The plaintiffs have paid the 10% deposit amounting to RM6,380 and they are ready and willing to perform their part of the bargain. But the defendant says that the corner unit claimed by the plaintiffs, that is, Parcel No: D2-8-3B was purchased and is owned by a third party with *bona fide* rights over the corner unit as the third party had paid the full consideration for the corner unit from the very beginning and, consequently, it is impossible for this court to grant the specific performance in favour of the plaintiffs. The defendant also proposed that a supplemental agreement be signed whereby the plaintiffs would be purchasing the end lot unit bearing Parcel No: D2-1-3B and not the corner unit bearing Parcel No: D2-8-3B but the plaintiffs did not agree to such a variation.

Preliminary Objections

The defendant raised two preliminary objections. The first objection relates to the intitulement that appears in the originating summons in enclosure one (1) which is said to be in error. But that error has virtually been rectified when the plaintiffs amended the originating summons on 23 December 2004. Even though the amendment to the originating summons was made without leave of the court yet it is only an irregularity and it is curable under O. 2 r. 1 of the Rules of the High Court 1980 ("RHC"). The second objection centres on the argument that the entire proceedings are defective and ought to be dismissed as it does not comply with the requirements of O. 28 r. 3(4) of the RHC in that the plaintiffs' affidavit dated 11 October 2003 was affirmed five (5) days before the said summons was filed on 16 October 2003 and that such mistake is not curable and is fatal. On the authority of *Kewangan Bersatu Bhd (previously known as Kewangan Usaha Bersatu Bhd) v. Metropolitan Property Holdings Sdn Bhd* [1996] 1 MLJ 79, I must overrule the second objection as it is without merit whatsoever.

The Law – Specific Performance And Mutual Mistake

According to Lord Chelmsford in *Lamare v. Dixon* [1873] LR 6 HL 414 at p. 423, it is not a matter of right for the person seeking relief for specific performance to obtain it, it is for the court to exercise its discretion whether to grant specific performance or otherwise. In exercising its discretion the court must always take heed of what Lord Parker had said in *Stickney v. Keeble* [1915] AC 386 at 419:

> Indeed, the dominant principle has always been that equity will only grant specific performance if, under all the circumstances, it is just and equitable to do so.

So, it is correct to say that specific performance is an equitable remedy and it is entirely at the discretion of the court to grant it. If the effect of specific performance is to cause unfairness or undue hardship to the defendant, then it will be refused. For instance, in *Denne v. Light* [1857] 8 De G. M. & G. 774; 44 ER 588, specific performance of a contract for the sale and purchase of land was refused because the buyer was unable to enter upon the subject land without getting a licence from the adjoining owners since there was no access road. Another example would be the case of *Norton v. Angus* [1926] 38 CLR 523. In that case the parties had entered into a contract for the sale and purchase of two Crown leasehold properties. Under the terms of the Land Act 1910 (Qld) it was illegal for the defendant to accept a transfer of both properties and, if specific performance were ordered, he would have had to sell, give away or forfeit one of the properties. It was held that in the circumstances, and taking into account the possibility of forfeiture, an order for specific performance could not be justified. The defendant was ordered to pay damages instead.

In *Patel v. Ali* [1984] 1 All ER 97, hardship was held to be sufficient to justify refusal of specific performance. The facts in that case may be stated as follows. In July 1979 Mrs. Ali contracted to sell her house to Mr. Patel. At that time she had one child and was in good health. Mrs. Ali spoke English very badly. Through neither party's fault, completion was initially delayed. By the time the court came to consider whether Mr. Patel should be granted specific performance, Mrs. Ali had two more children and cancer had resulted in the amputation of her leg. She claimed that specific performance would cause her great hardship. She would have to move and her poor English, coupled with her disability, made her very reliant upon assistance from friends and relations who lived close by the home she had contracted to sell. Goulding J, exercised his discretion not to order specific performance. However, his Lordship's refusal was subject to Mrs. Ali paying a sum of money into court to ensure that Mr. Patel would receive his damages, once they had been calculated. In deciding to exercise his Lordship's discretion and to refuse specific performance, the learned judge acknowledged that (see p. 981 of the report):

> … in the majority of cases the hardship which moves the court to refuse specific performance is either a hardship existing at the date of the contract or a hardship due in some way to the plaintiff.

The learned judge was satisfied that the court's discretion was wide enough to refuse specific performance in other cases of hardship. In the particular case, although the hardship was not caused by Mr. Patel, yet specific performance was refused because, in the circumstances, it would inflict a "hardship amounting to injustice" to grant it. The delay was not due to the fault of either party and an order of specific performance would force Mrs. Ali to move in circumstances very different from those which she contemplated when contracting.

I will now say something about the mistake as to the subject matter of the contract. Mutual mistake arises where the parties are at cross-purposes as to the subject matter of the contract. That being the case, there is no genuine agreement despite appearances. Put in another way, where one party intends to sell one thing and the other party intends to buy something different; or where one party intends to contract on one set of terms and the other intends to deal on a different set of terms – such cross-purposes are known as mutual mistake. It arises where the parties are mistaken as to each other's intention. A classic example would be the case of *Raffles v. Wichelhaus* [1864] 2 H & C 906 where the facts may be stated as follows:

> D agreed to buy from P a cargo of 125 bales of Surat cotton 'to arrive ex Peerless from Bombay'. D meant the 'Peerless' which sailed in October, and P meant the 'Peerless' which sailed in December. D refused to accept the cotton sent on the ship which sailed in December. P claimed that he was ready to deliver the goods which were shipped on the vessel named in the agreement and from the agreed port, and that D was liable for refusing to accept or pay for the goods.

The court held that D was not liable due to the ambiguity inherent in the agreement. In fact, the court for procedural reasons did not have to decide whether there was a contract, but the most plausible inference from the decision is that there was no contract at all.

Another classic case would be that of *Scriven Bros v. Hindley & Co* [1913] 3 KB 564. That was a case involving ambiguity in an apparent agreement. The facts of that case may be stated as follows:

> P instructed an auctioneer to sell a number of bales of hemp and of tow by auction. (Tow is the coarse and broken part of flax or hemp). The goods were described in the auctioneer's catalogue as a certain number of bales in two separate lots, with the same shipping mark, without disclosing the difference in the commodities; ie it failed to state that one lot contained tow, not hemp.

> Before the sale, samples of the hemp and tow were available for inspection in a showroom. On the floor of the room the catalogue numbers of the lots of hemp and tow were marked in chalk opposite the respective samples. Having previously examined the hemp and mistakenly believing both lots to contain hemp, D's manager did not inspect the samples which were available. At the auction D's buyer, thinking that he was bidding for hemp, made an excessively high bid for the lot containing tow. His bid was successful. Expert witnesses stated that it was very unusual for Russian tow and Russian hemp to be landed from the same ship under the same shipping mark. P brought an action to recover the price.

It is apparent from the recital of the facts that P intended to sell one thing, whilst D intended to buy something else. Neither was aware of the other party's misapprehension. It was held that there was no contract of sale as the parties had not reached an agreement as to the subject matter of the proposed sale.

The critical ingredient of mutual consent is true consent. One may ask, have the parties truly consented, via their offer and acceptance, to the same thing? At common law, a contract entered into under mutual mistake is void. If a contract is void at common law, it will also be void in equity.

Analysis

It is the stand of the defendant that as a result of the mistake, the sale and purchase agreement has been rendered void from the very beginning. The defendant says that the apparent sale and purchase agreement has been vitiated by mutual mistake. It is argued that, at all material times, the defendant had only intended to sell an end lot unit and not a corner unit. The defendant says that the mistake is an important term of the sale and purchase agreement. I agree with the submissions of the defendant. I say that the mutual mistake has rendered the sale and purchase agreement to be void. The parties, although intending to enter into a property transaction agreement, had made a mistake as to the unit number and its position. The plaintiffs intended to purchase a corner unit while the defendant intended to sell an end lot unit. Their minds did not meet. It is a mutual mistake where the consent of the contracting parties was not given freely for the same purpose resulting in the agreement being void. Section 10(1) of the Contracts Act 1950 enacts as follows:

> All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Section 13 of the Contracts Act 1950 defines "consent" to mean:

> Two or more persons are said to consent when they agree upon the same thing in the same sense.

Here, the parties did not agree to "the same thing in the same sense." The plaintiffs agree to purchase a corner unit while the defendant agrees to sell the end lot unit. Consequently, there is no free consent flowing from the parties thereto. In *M. Pakiam v. Y.P. Devathanjam* [1952] 18 MLJ 58, Briggs J, writing a separate judgment for the Court of Appeal had this to say at p. 62 of the report:

> The judgment, if I understand it rightly, proceeded on the basis that the defendant purported to assign to the plaintiff the benefit of a tapping contract which must subsist for at least three months, and that, since the tapping contract was only on a monthly basis, this proved the existence of a mistake in the mind of the purchaser (though not necessarily the vendor) concerning the subject matter of the transaction so fundamental as to prevent the parties from ever being *ad idem*. Where mistake of that kind exists in the mind of one party its effect is of course that no contract ever comes into existence at all, and neither section 21 nor section 23 of the Contracts (Malay States) Ordinance, 1950, is in point. The relevant provision is section 13. See Pollock and Mulla on the Indian Contract Act, 6th edition, page 84 et seqq.

And, it must be borne in mind that according to s. 14 of the Contracts Act 1950, the phrase "free consent" is defined as follows:

> Consent is said to be free when it is not caused by:
>
> (e) mistake, subject to sections 21, 22 and 23.
>
> Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

Then there is s. 21 of the Contracts Act 1950 which enacts as follows:

> Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Dato' Seri Dr. Visu Sinnadurai in his book entitled *"Law of Contract"* at p. 295 after citing Cheshire, Fifoot and Furmston's Law of Contract, proceeded to quote passages from the learned authors' book which read as follows:

> In mutual mistake, the parties misunderstand each other and are at cross purposes. A, for example, intends to offer his Ford Sierra car for sale, but B believes that the offer relates to the Ford Granada also owned by A.

Flowing down the same page, the passage reads as follows:

> Where mutual or unilateral mistake is pleaded, the very existence of the agreement is denied. The argument is that, despite appearances, there is no real correspondence of offer and acceptance and that therefore the transaction must necessarily be void.

In regard to s. 21 of the Contracts Act 1950, Dato' Seri Dr. Visu Sinnadurai explained it in his book *"Law of Contract"* in this way (see p. 303 of the book):

> However, it would appear that the basis for rendering agreements void under section 21 is that, in such situations, either there had been no free consent between the parties, or the consent was nullified: see section 14.

Reference to the following cases would also be ideal:

(1) *Sheikh Brothers Ltd v. Arnold Julius Ochsner And Another* [1957] AC 136;

(2) *United Asian Bank Berhad v. Chun Chai Chai @ Chan Eng Kee & 5 Ors* [1988] 2 CLJ 253; [1988] 2 CLJ (Rep) 502;

(3) *Tham Kong v. Oh Hiam & Ors* [1968] 1 MLJ 44, FC; and

(4) *Ng Chun Lin & Anor v. Foo Lian Sin & Anor* [2000] 6 CLJ 133.

Out of deference to the learned judges who decided the above cases, I must refer to the judgment of Barakbah LP in the case of *Tham Kong v. Oh Hiam & Ors (supra)*. There his Lordship referred to s. 21 of the Contracts Act 1950 and said (see p. 45 of the report):

> According to section 21 of the Contracts (Malay States) Ordinance, 1950, where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. Mistakes may be classified into: (1) common mistake; (2) mutual mistake; and (3) unilateral mistake. Mistake is common where both parties make the same mistake. Each knows the intention of the other and accepts it, but each is mistaken about some underlying and fundamental fact. The mistake is mutual where the parties misunderstand each other and are at cross-purposes. In unilateral mistake only one of the parties suffers from some mistake.

It must be recalled that the parties had agreed to the sale and purchase of the rear facing property but were at cross purposes as to the unit intended. The plaintiffs intended to purchase a corner unit while the defendant intended to sell an end lot unit. Based on the authorities alluded to in this judgment, the agreement must be held to be void. It seems that all the purchasers of the properties from the said project who were similarly affected by the mistake as to the floor plans and marking of the property unit numbers including the

actual owner of Parcel No: D2-8-3B which is being claimed by the plaintiffs had admitted to and accepted the mistake and had consequently executed a supplemental agreement to rectify the mistake that had occurred without affecting the rights of any other party. Now, even if it is found that there was no mistake occasioned, and this is vehemently denied by the defendant, the fact remains that the corner unit bearing Parcel No: D2-8-3B was purchased and is owned by a third party with bona fide rights over the said corner unit as that third party had paid the full consideration for the said corner unit from the very beginning and so the claim of the plaintiffs against the defendant is impossible of performance. Specific performance will not be granted to the plaintiffs because the subject matter of the property, namely, the corner unit bearing Parcel No: D2-8-3B has been purchased by a *bona fide* third party purchaser. The apparent agreement between the parties is vitiated by mutual mistake and is void in law.

It must be emphasised that the declaration prayed for by the plaintiffs that they be allowed to pay for the difference in the size of the unit demanded by them is unreasonable as the relevant clause in the sale and purchase agreement clearly states that the provisions therein are only applicable for adjustment of the purchase price upon issuance of the individual title deed and even if cls. 10 and 11 of the sale and purchase agreement are utilised as a guide it is only applicable if the corner unit now claimed by the plaintiffs is not owned by any *bona fide* third party purchaser.

I reiterate that the granting of an order for specific performance is wholly within the purview of this court and based on the matters as hereinbefore explained, it is clear that the sale and purchase agreement is void from the very beginning and the facts also show that it is impossible for the said agreement to be specifically performed unless the plaintiffs are willing to accept the variations as suggested in exh. "TCS4" of encl. 2, namely, to accept the end lot unit bearing Parcel No: D2-1-3B. But the plaintiffs are still adamant and they say that they would not have purchased any property from the defendant if they had realised that the unit that was sold to them is not a corner unit. The defendant says that it is ready and willing to put the plaintiffs back to the position before they executed the sale and purchase agreement. Towards this end, it is ideal to refer to s. 20 of the Specific Relief Act 1950 which enacts as follows:

> 20. Contracts not specifically enforceable.
>
> (1) The following contracts cannot be specifically enforced:
>
> (a) a contract for the non-performance of which compensation in money is an adequate relief.

This would be followed by s. 66 of the Contracts Act 1950. That section enacts as follows:

66. Obligation of person who has received advantage under void agreement, or contract that becomes void.

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

ILLUSTRATIONS

(a) A pays B $1,000 in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the $1,000.

(b) A contracts with B to deliver to him 250 gantangs of rice before the 1st of May. A delivers 130 gantangs only before that day, and none later. B retains the 130 gantangs after the 1st of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her $100 for each night's performance. On the sixth night A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for $1,000, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A been able to sing, but must refund to B the $1,000 paid in advance.

And what Lee Hun Hoe CJ (Borneo) said in Federal Court case of *Ted Bates (M) Sdn. Bhd. v. Balbir Singh Jholl* [1979] 2 MLJ 257 at p. 259 bears repetition. It is this:

Section 66 of the Contracts Act, 1950, provides that where an agreement is discovered to be void, or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it, or make compensation for it, to the person from whom he received it. Apart from this, sections such as 65, 71, 74, 75 and 76 also produce the same result. As was held by the Privy Council in *Menaka v. Lum Kum Chum* [1977] 1 MLJ 91, 94 that the principle of section 66 was 'a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation'.

All these go to show that there is only one conclusion that can be reached. It is this. That an order for specific performance is not suitable to be granted in the circumstances. It is also patently unfair to grant specific performance because the corner unit is already sold to a *bona fide* third party purchaser for value. The judgment of this court, in the circumstances, would be that the plaintiffs' originating summons in enclosure one (1) should be dismissed with costs and the defendant is also hereby ordered to make restitution to the plaintiffs the sum of RM6,380 being 10% of the purchase price which the plaintiffs had paid to the defendant.